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Emily B Caudill REGULATIONS COMPILED

1 ENERGY AND ENVIRONMENT CABINET

2 Department for Natural Resources

3 Division of Mine Reclamation and Enforcement

4 (Amendment)

5 405 KAR 7:040. General obligations of operators and permittees.

6 RELATES TO: KRS 350.050, 350.057, 350.060, 350.410, 350.450

7 STATUTORY AUTHORITY: KRS 350.020, 350.028, 350.057, 350.060, 350.090, 350.151,  
8 350.465

9 NECESSITY, FUNCTION, AND CONFORMITY: KRS Chapter 350 [~~in pertinent part~~]  
10 requires the cabinet to promulgate [~~rules and~~] administrative regulations pertaining to surface coal  
11 mining and reclamation operations. This administrative regulation sets forth the basic requirements  
12 and general obligations of operators and permittees. This administrative regulation prescribes certain  
13 methods of disposal of materials and other obligations of operators and permittees.

14 Section 1. General Requirements for Permits and Exploration Approvals. (1) Requirement  
15 to obtain a permit. No person or operator shall engage in surface coal mining and reclamation  
16 operations without first having obtained from the cabinet a valid permit covering the area of land to  
17 be affected.

18 (2) Requirement to obtain exploration approval. Subject to the provisions of 405 KAR 8:020,  
19 no person or operator shall engage in coal exploration operations without first having filed a written  
20 notice of intention to explore or having obtained written approval from the cabinet.

1       (3) Requirement to comply with permit or exploration approval. A permittee or person issued  
2 a coal exploration approval shall comply with all terms and conditions placed upon the permit or  
3 exploration approval by the cabinet and with all plans submitted as part of the application approved  
4 by the cabinet.

5       Section 2. Disposal of Materials. A person or operator engaged in surface coal mining and  
6 reclamation operations shall not throw, pile, dump or permit the throwing, piling, dumping or  
7 otherwise placing of any overburden, stones, rocks, coal, particles of coal, earth, soil, dirt, debris,  
8 trees, wood, logs, or any other materials or substances of any kind or nature beyond or outside of an  
9 area of land which is under permit and for which bond has been posted pursuant to KRS Chapter  
10 350, nor place such materials herein described in such a way that normal erosion or slides brought  
11 about by natural physical changes will permit such materials to go beyond or outside of an area of  
12 land which is under permit and for which bond has been posted pursuant to KRS Chapter 350.

13       Section 3. Unsafe Practices. (1) A person or operator engaged in surface coal mining and  
14 reclamation operations shall not engage in any operations which result in a condition or constitute a  
15 practice that creates an imminent danger to the health or safety of the public.

16       (2) A person or operator engaged in surface coal mining and reclamation operations shall not  
17 engage in any operations which result in a condition or constitute a practice that causes or can  
18 reasonably be expected to cause significant, imminent environmental harm to land, air, or water re-  
19 sources.

20       (3) Upon development of any emergency conditions which threaten the life, health, or  
21 property of the public, the operator shall immediately notify the persons whose life, health or  
22 property are so threatened, shall take any and all reasonable actions to eliminate the conditions  
23 creating the emergency, and shall immediately provide notice of the emergency conditions to the

cabinet, to local law enforcement officials and to appropriate local government officials. Any emergency action taken by an operator pursuant to this subsection shall not relieve the operator of other obligations pursuant to 405 KAR Chapters 7 through 24 or of obligations under other applicable local, state or federal laws and regulations.

Section 4. ~~[Existing Structures on Areas Sought to be Permitted. (1) Except as provided in subsection (2) of this section, no application for a permit or a revision which proposes to use an existing structure in connection with or to facilitate the proposed coal exploration or surface coal mining and reclamation operation shall be approved, unless the applicant demonstrates and the cabinet finds, in writing, on the basis of complete information set forth in the complete application that:~~

~~(a) Irrespective of whether the structure meets the design requirements of 405 KAR Chapters 16 through 20, the existing structure will operate in compliance with the performance standards set forth in 405 KAR Chapters 16 through 20;~~

~~(b) No significant harm to the environment or public health or safety will result from the use of the structure; and~~

~~(c) The applicant will monitor the structure as required by the cabinet to determine compliance with the performance standards of 405 KAR Chapters 16 through 20.~~

~~(2) In the event the applicant fails to demonstrate that the existing structure meets the requirements of subsection (1) of this section, no application for a permit or revision which proposes to use such an existing structure in connection with or to facilitate the proposed coal exploration or surface coal mining and reclamation operation shall be approved unless the applicant demonstrates and the cabinet finds, in writing, on the basis of complete information set forth in the complete application that:~~

~~(a) Such existing structure complies with the performance standards of 405 KAR Chapter 1 or 3; and~~

~~(b) 405 KAR Chapters 16 through 20 require performance standards for such existing structure which either are not required by, or are more stringent than the performance standards of 405 KAR Chapter 1 or 3; and~~

~~(c) The applicant has included as a part of the application a compliance plan for modification or reconstruction of the structure demonstrating:~~

~~1. That the modification or reconstruction of the structure will bring the structure into compliance with the performance standards of 405 KAR Chapters 16 through 20 as soon as possible but not later than six (6) months from the date of issuance of the permit unless the applicant demonstrates to the satisfaction of the cabinet that a longer time is necessary due to the scope and nature of the reconstruction;~~

~~2. That the risk of harm to the environment or to public health or safety is not significant during the period of modification or reconstruction; and~~

~~3. The applicant will monitor the structure as required by the cabinet to determine compliance with the performance standards of 405 KAR Chapters 16 through 20.~~

~~(d) Should the cabinet find that the existing structure cannot be reconstructed without causing significant harm to the environment or public health or safety, the applicant will be required to abandon or remove the existing structure in the manner provided in 405 KAR 16:010 or 405 KAR 18:010. The structure shall not be used for or to facilitate surface coal mining operations after the date a permanent program permit is required under 405 KAR 8:010.~~

~~(3) In the event that 405 KAR Chapter 1 or 3 prescribes a performance standard applicable to any such existing structure which performance standard has not been complied with by the~~

1 ~~applicant, no permit shall be issued by the cabinet unless the applicant shall have redesigned and~~  
2 ~~reconstructed such existing structure in accordance with the design requirements of 405 KAR~~  
3 ~~Chapters 16 through 20.~~

4 ~~(4) Existing structures allowed to operate subsequent to permit approval as provided in~~  
5 ~~subsection (1) of this section shall not include coal waste piles used either temporarily or~~  
6 ~~permanently as dams or embankments. Such existing coal waste piles allowed to operate subsequent~~  
7 ~~to permit approval as provided in subsection (2) of this section must be modified or reconstructed in~~  
8 ~~order to comply with the design requirements of 405 KAR Chapters 16 through 20 in addition to the~~  
9 ~~performance standards.~~

10 ~~(5) Any structures or facilities which must be reconstructed pursuant to subsection (2) of this~~  
11 ~~section shall be reconstructed according to engineering plans prepared and certified by a registered~~  
12 ~~professional engineer. Upon completion of reconstruction, the responsible engineer shall certify to~~  
13 ~~the cabinet, within fourteen (14) days thereafter, that the reconstruction was performed in accordance~~  
14 ~~with the approved design plans.~~

15 ~~Section 5.] Hazard Classifications for Impoundments. (1) For proposed new sedimentation~~  
16 ~~ponds or other new impoundments [and those proposed for reconstruction pursuant to Section 4(2)~~  
17 ~~and (3) of this administrative regulation], the responsible design engineer shall determine the~~  
18 ~~structure hazard classification according to the classification descriptions. For structures classified~~  
19 ~~(B) - moderate hazard or (C) - high hazard, the operator shall obtain a permit from the cabinet~~  
20 ~~pursuant to KRS 151.250, and administrative regulations adopted pursuant thereto, prior to~~  
21 ~~beginning [reconstruction or] construction.~~

(2) Structure hazard classifications are as follows: The following broad classes of structures are established to permit the association of criteria with the damage that might result from a sudden major breach of the structure:

(a) Class (A); low hazard: structures located such that failure would cause loss of the structure itself but little or no additional damage to other property. Such structures will generally be located in rural or agricultural areas where failure may damage farm buildings other than residences, agricultural lands, or county roads.

(b) Class (B); moderate hazard: structures located such that failure may cause significant damage to property and project operation, but loss of human life is not envisioned. Such structures will generally be located in predominantly rural agricultural areas where failures may damage isolated homes, main highways or major railroads, or cause interruptions of use or service of relatively important public utilities.

(c) Class (C); high hazard: structures located such that failure may cause loss of life, or serious damage to homes, industrial or commercial buildings, important public utilities, main highways or major railroads. This classification shall [~~must~~] be used if failure would cause probable loss of human life.

(3) The responsible engineer shall determine the classification of the structure after considering the characteristics of the valley below the site and probable future development. Establishment of minimum criteria does not preclude provisions for greater safety when deemed necessary in the judgment of the engineer. Considerations other than those mentioned in the above classifications may require that the established minimum criteria be exceeded, as determined by the cabinet. A statement of the classification established by the responsible engineer shall be clearly shown on the first sheet of the design drawings.

1 (4) When structures are spaced so that the failure of an upper structure could endanger the  
2 safe-ty of a lower structure, the possibility of a multiple failure shall ~~[must]~~ be considered in  
3 assigning the structure classification of the upstream structure.

4 Section (5) [6]. Reports Required. The operator shall submit such reports, documentation,  
5 certifications, or other information as the cabinet may require, or as may be required by KRS Chapter  
6 350 and administrative regulations adopted pursuant thereto.

7 Section (6) [7]. Coal Exploration. (1) Any person conducting coal exploration ~~[on or after~~  
8 ~~the date specified in Section 11 of this administrative regulation]~~ shall either file a Notice of Intention  
9 to Explore or obtain approval of the cabinet as required by 405 KAR 8:020.

10 (2) The coal exploration performance standards in 405 KAR 20:010 shall apply to coal  
11 exploration which substantially disturbs the natural land surface ~~[two (2) months after the date~~  
12 ~~specified in Section 11 of this administrative regulation]~~.

13 Section (7) [8]. Compliance with 405 KAR Chapters 7 through 24 does not relieve any  
14 person or operator from the obligation to comply with other applicable administrative regulations of  
15 the cabinet.

16 Section (8) [9]. The requirement to restore the approximate original contour of the land shall  
17 apply regardless of any reconstruction of any existing structure allowed ~~[pursuant to Section 4 of~~  
18 ~~this administrative regulation]~~.

19 Section (9) [10]. Certifications by Registered Professional Engineers. (1) A document  
20 required to be certified shall be rejected by the cabinet as incomplete if its accuracy is not so attested.

21 (2) Certification by a qualified registered professional engineer as required by 405 KAR  
22 Chapters 7 - 24 means a good faith representation to the best of his or her knowledge and belief,  
23 based on adequate knowledge of the requirements of KRS Chapter 350 and 405 KAR Chapters 7 -

1 24, related experience, best professional judgment, accepted engineering practices and recognized  
2 professional standards, and standard practice as it relates to direct participation by the registered  
3 professional engineer or supervision of the registered professional engineer's employees or  
4 subordinates. Such certification shall not be construed to constitute a warranty or guarantee.

5 (3) Certification of maps, plans, and drawings. Where 405 KAR requires that maps, plans,  
6 and drawings be certified by a qualified registered professional engineer, the registered professional  
7 engineer shall certify:

8 (a) That the information or documentation contained in the map, plan, or drawing is correct  
9 as determined by accepted engineering practices; and

10 (b) That the map, plan or drawing includes all the information required by KRS Chapter 350  
11 and 405 KAR Chapters 7 - 24.

12 (4) Certification of designs. Where 405 KAR Chapters 7 - 24 requires that a qualified  
13 registered professional engineer design and certify a facility, he or she shall certify that:

14 (a) The design is in accordance with accepted engineering practices and recognized  
15 professional standards;

16 (b) The design complies with the design requirements of KRS Chapter 350 and 405 KAR  
17 Chapters 7 - 24; and

18 (c) Provided the facility is properly constructed, operated, and maintained, the design is  
19 adequate for the facility to meet the applicable performance standards of KRS Chapter 350 and 405  
20 KAR Chapters 7 - 24 insofar as such performance can reasonably be predicted by accepted  
21 engineering practices.

22 (5) Certification of construction.



1 (a) Where 405 KAR Chapters 7 - 24 requires that a qualified registered professional engineer  
2 certify that a facility was constructed in accordance with the design approved by the cabinet, he or  
3 she shall certify:

4 1. That adequate inspections were conducted by the qualified registered professional  
5 engineer or by persons under his or her supervision;

6 2. That the construction was performed in accordance with accepted construction practices;  
7 and

8 3. Either that the facility was constructed in accordance with the design approved by the  
9 cabinet, or that the facility was constructed in accordance with the design approved by the cabinet  
10 except for certain minor deviations which will not adversely affect the performance of the facility  
11 nor render the facility in violation of KRS Chapter 350 and 405 KAR Chapters 7 - 24.

12 (b) Any minor deviations shall be described in the certification document and the effect of  
13 the deviations upon the performance of the facility shall be explained.

14 (c) As-built drawings shall be submitted as a part of the certification.

15 (6) Certification of maintenance. Where 405 KAR Chapters 7 - 24 requires that a qualified  
16 registered professional engineer certify the maintenance of a structure, he or she shall certify that:

17 (a) An inspection of the structure was conducted by the registered professional engineer or  
18 by a person under his or her supervision; and

19 (b) Based on that inspection, the registered professional engineer has determined that the  
20 structure has been maintained as required by 405 KAR Chapters 7 - 24.

21 (7) Certifications shall be made in the form prescribed by the cabinet, and the cabinet may  
22 reject any certification which is not made in such form.

405 KAR 7:040 approved for filing.  
Pages (1-9)

9/13/2019  
Date

Charles G. Snaveley  
Charles G. Snaveley, Secretary  
Energy and Environment Cabinet

**PUBLIC HEARING AND PUBLIC COMMENT PERIOD:** A public hearing on this administrative regulation shall be held on November 26, 2019 at 5:00 P.M. (Eastern Time) in Training Room C of the Energy and Environment Cabinet at 300 Sower Blvd, Frankfort, Kentucky. Individuals interested in being heard at this hearing shall notify this agency five workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through November 30, 2019. Send written notification of intent to attend the public hearing or written comments on the proposed administrative regulation to the contact person.

**CONTACT PERSON:** Michael Mullins, Regulation Coordinator, 300 Sower Blvd, Frankfort, Kentucky 40601, phone: (502) 782-6720, fax: (502) 564-4245, email: michael.mullins@ky.gov.

## REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Administrative Regulation No.: 405 KAR 7:040  
Contact Person: Michael Mullins

Contact number: (502) 782-6720  
Email: michael.mullins@ky.gov

- (1) Provide a brief summary of:
  - (a) What this administrative regulation does: This administrative regulation prescribes certain methods of disposal of materials and other obligations of operators and permittees.
  - (b) The necessity of this administrative regulation: This administrative regulation is necessary to establish methods of disposal of materials and other obligations of operators and permittees.
  - (c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 350.028 authorizes the cabinet to adopt administrative regulations pertaining to surface coal mining operations to accomplish the purposes of KRS Chapter 350. This administrative regulation prescribes certain methods of disposal of materials and other obligations of operators and permittees as authorized by KRS 350.028.
  - (d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation assists in the effective administration of the statutes by providing information related to methods of disposal of materials and other obligations of operators and permittees.
- (2) If this is an amendment to an existing administrative regulation, provide a brief summary of:
  - (a) How the amendment will change this existing administrative regulation: This amendment deletes language that allowed an entity to use an existing structure that was used under the interim program to be used as part of a new permanent program permit application if it meets certain criteria or would meet them in the future.
  - (b) The necessity of the amendment to this administrative regulation: This amendment is necessary to remove language that allowed an entity to use an existing structure that was used under the interim program to be used as part of a new permanent program permit application if it meets certain criteria or would meet them in the future. The cabinet believes this language is no longer necessary.
  - (c) How the amendment conforms to the content of the authorizing statutes: The amendment conforms to the authorizing statutes by correcting a section of the administrative regulation that had information related to a process that the cabinet believes is no longer necessary.

- (d) How the amendment will assist in the effective administration of statutes: These amendments removes language that allowed an entity to use an existing structure that was used under the interim program to be used as part of a new permanent program permit application if it meets certain criteria or would meet them in the future. The amendment removes this ability as the cabinet believes that no structure will be used as a permit application request.
- (3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation. This provision could apply to any entity that operates coal mines within Kentucky. There are 175 licensed mines in the Commonwealth.
- (4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:
  - (a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: The regulated entities identified in question (3) will not be allowed to use an existing structure that was used under the old interim program as part of a new permit application.
  - (b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There will be no additional costs associated with these amendments. If an entity intends on using an existing structure as part of their permit application then it would need to meet permanent program standards.
  - (c) As a result of compliance, what benefits will accrue to the entities identified in question (3): These amendments will clearly establish standards regarding existing structures.
- (5) Provide an estimate of how much it will cost to implement this administrative regulation:
  - (a) Initially: The division will not incur any additional costs for the implementation of this administrative regulation.
  - (b) On a continuing basis: The division will not incur any additional costs for the implementation of this administrative regulation.
- (6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: A combination of general and restricted funds will be used for the implementation of this administrative regulation.
- (7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment. No increase in fees or funding is necessary to implement this amendment.

- (8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees. This administrative regulation does not establish any fees, nor does it directly or indirectly increase any fees.
- (9) TIERING: Is tiering applied? (Explain why tiering was or was not used.)  
No, tiering was not used. The provisions in this administrative regulation will apply equally to all coal operators.

## FISCAL NOTE ON STATE AND LOCAL GOVERNMENT

Administrative Regulation No.: 405 KAR 7:040

Contact Person: Michael Mullins

Contact number: (502) 782-6720

Email: michael.mullins@ky.gov

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation?  
This administrative regulation applies to the Division of Mine Permits and the Division of Mine Reclamation and Enforcement.
2. Identify each state or federal statute or federal regulation that requires or authorizes action taken by the administrative regulation. KRS 350.020, 350.028, 350.057, 350.060, 350.090, 350.151, 350.465
3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the regulation is to be in effect.
  - (a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? The proposed administrative regulation will not generate revenue in the first year.
  - (b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? The proposed administrative regulation will not generate revenue in subsequent years.
  - (c) How much will it cost to administer this program for the first year? The cabinet's current operating budget will be used to administer this program for the first year.
  - (d) How much will it cost to administer this program for subsequent years? The cabinet's operating budget will be used to administer this program for subsequent years.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impacts of the administrative regulation.

Revenues (+/-):

There is no known effect on current revenues.

Expenditures (+/-):

There is no known effect on current expenditures.

Other Explanation:

There is no further explanation.

## FEDERAL MANDATE ANALYSIS COMPARISON

Administrative Regulation No.: 405 KAR 7:040  
Contact Person: Michael Mullins, Reg. Coordinator

Contact number: (502) 782-6720  
Email: Michael.mullins@ky.gov

1. Federal statute or regulation constituting the federal mandate. 30 C.F. R. 701.11
2. State Compliance Standards. KRS 350.028 and 350.060.
3. Minimum or uniform standards contained in the federal mandate. The C.F.R. citations listed above provides the general information related to permits.
4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements, than those required by the federal mandate? No. The amendments will not make the program more stringent than the federal program.
5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements. NA